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Supreme Court, U.S.
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No. 00-1438

In The

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,

Petitioners,

v.

G.M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

DEFENDANT-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. Proceedings in the District Court

The following summary of the factual and procedural history of this case is, in part, paraphrased from the opinion of the Eleventh Circuit Court of Appeals. Pet. App. 1a.

1. Proceedings Leading to Consent Decree I. The named plaintiffs brought this suit against the Defendant-Respondents Alabama Department of Transportation, State Personnel Department, and various state officials (collectively "the Department") in May 1985, alleging that the Department had discriminated against them in their employment because of their race. In October 1986, the district court certified three plaintiff classes. Pet. App. 4a.

In June 1992, the case proceeded to trial before the district court. After several months of trial, but before plaintiffs rested, the court granted the parties' request for an indefinite recess for the purpose of settlement negotiations. In November 1993, the parties reached a partial settlement and presented a proposed consent decree to the court. Pet. App. 5a.

The proposed decree provided for prospective injunctive relief, but left the monetary and non-monetary claims of individual class members for subsequent trial. Among other relief, the decree set hiring and promotion quotas for blacks. To ensure an adequate pool for this set-aside program, the decree directed the Department to mount an aggressive recruiting campaign at historically black colleges and universities. Finally, the decree

required the Department to establish a grievance procedure for its employees. Pet. App. 5a.

The district court scheduled a hearing for January 19, 1994, to entertain any objections to the terms of the proposed decree. On January 13, a group of white Department employees (the "Adams Intervenors") sought leave to intervene on behalf of the Department's non-black employees in order to challenge the race-conscious provisions of the proposed decree – specifically, the quota requirement for all job classifications in the Department. The court granted the motion. Pet. App. 6a.[1]

More than 200 people attended the January 19 hearing, including many non-black employees of the Department. The objections to the race-conscious aspects of the proposed consent decree were such that the parties withdrew it and, with leave of court, went back to the drawing board. By late February 1994, the plaintiffs and the Department decided to divide the previously proposed decree into three parts, called Consent Decrees I, II, and III. Consent Decree I contained the provisions – some of which were modified as a result of negotiations with the Adams Intervenors – which all sides agreed provided only race-neutral prospective relief. Consent Decrees II and III contained provisions that were acceptable to the plaintiffs and were then acceptable to the Department, but were opposed as race-conscious by the Adams Intervenors. Pet. App. 6a.

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[1] The district court later certified an additional class, consisting of the Department's non-black employees.

The parties submitted Consent Decree I to the district court for approval, and, on March 7, the court held a hearing on the fairness of the proposal. No one other than the parties' attorneys appeared at the hearing, and no one objected to the entry of the decree. The court approved the decree and, by order entered March 16, 1994, adopted it in full. Pet. App. 7a.

2. *District Court's "Findings."* The Petition makes the extraordinary statement that "the District Court ultimately found[ ] that ALDOT had manipulated and circumvented employment procedures so as to avoid hiring or promoting black employees." Pet. 3. As previously noted, Consent Decree I was entered before the close of plaintiffs' case. Pet. App. 5a. The Department had no opportunity to rebut the plaintiffs' evidence or to offer evidence of its own. Based on this partial trial, the district court was never in a position to make any "findings." In May 1996, during a hearing to establish a back pay formula, the district court announced from the bench that Consent Decree I had established "class-wide liability." *Reynolds v. Roberts*, 202 F.3d 1303, 1310 (11th Cir. 2000) (*"Reynolds I"*). This decision was challenged in a previous appeal, however, and was reversed. *Reynolds I*, 202 F. 3d at 1319. Accordingly, the Department respectfully submits that plaintiffs' erroneous statements as to the district court's "findings" should be disregarded.

3. *Consent Decree I.* Consent Decree I is composed of a series of "Articles" which revamped the process by which the Department hires, promotes, classifies, and pays its employees. None of the Articles of Consent Decree I provide special benefits or procedures for black employees of the Department. Pet. App. 7a.

The only Articles relevant to this appeal are Article 15 and one provision of Article 19. Article 15 required the Department to conduct a study of all its employees (regardless of race) to determine if any employees were being assigned duties associated with a higher job classification than the one they then held, without receiving the higher pay and benefits associated with that position. If the study uncovered an employee "spending a majority of [his or her] working time in the performance of the duties and responsibilities of a higher job classification," the Department was required to reclassify the employee at the higher level (and therefore increase that employee's salary). Article 15 also required the Department "to monitor the duties and responsibilities performed by employees with the goal of assuring to the extent practicable that at least 90% of the duties and responsibilities performed by employees on a regular or non-emergency basis are within the job description for [the] job they are holding." Pet. App. 7a-8a.

4. *The Grievance Procedure.* Article 19 mandated the creation of a grievance procedure that individual employees could use:

> Within 180 days of the effective date of this Decree, the Highway Department will develop and implement an enhanced complaint procedure which assures that all discrimination complaints are processed without fear and reprisal within established time limits and that appropriate action is taken following [the resolution of a complaint]. Such procedure will be submitted to plaintiffs' counsel for review and

> comment at least 30 days prior to its implementation.

Pet. App. 8a.

The Department complied with this mandate and submitted a proposed complaint procedure, designated the "Revised Complaint Procedure," to plaintiffs' counsel for review. Plaintiffs' counsel approved the procedure. Although Article 19 did not require it to do so, the Department submitted the procedure to the district court. On August 9, 1995, the court incorporated the procedure in an "Order and Injunction." Pet. App. 8a-9a.

The grievance procedure is race-neutral. It opens by stating that "[t]he Consent Decree and Departmental policy mandate that all employees enjoy a work-place free from discrimination." The procedure allows a grievance to be filed for any "alleged wrong based upon the employee's race, color, creed, sex, national origin, age, or handicap." Moreover, it allows grievances for "a violation of the Consent Decree, or arising from matters that are the subject of the Consent Decree." The procedure is available to the Department's employees without regard to race. Pet. App. 9a.

The grievance procedure consists of four steps. In step one, a grievance is submitted to an employee's immediate supervisor. The supervisor responds in writing with a proposed resolution, which may or may not be accepted by the grievant. If the grievance cannot be resolved, it is submitted in step two to the Department's appointed Equal Employment Opportunity ("EEO") Monitor, who also proposes a solution. If the grievant finds the solution unacceptable, the process moves to step

three. Step three is a formal hearing within the Department, conducted by the Department's "Hearing Officer." If the matter is still not resolved, then, at step four, either party may seek arbitration before "an external arbitrator . . . selected from a panel of Seven (7) arbitrators, with Three (3) of such panel members to be designated by class counsel, Three (3) to be designated by the Department, and One (1) to be designated by agreement among the other Six." An employee with a grievance is not required to invoke the Revised Complaint Procedure; as the procedure states, an employee may file an "administrative charge or separate legal action" instead. Pet. App. 10a.

5. *The Grievances.* As noted, Consent Decree I approved in 1994 requires the Department, "to the extent practicable," to assure that employees are performing the duties within their job classification and are not being assigned extra duties without compensation. By 1996, a number of black employees of the Department had filed grievances alleging that the Department had assigned them out-of-classification duties. They sought back pay and/or a "provisional appointment" to the position whose duties they were actually performing. At least two of these grievances eventually made their way to the district court for a ruling, and, in both, the court ordered back pay and issued an injunction mandating a provisional appointment for the employee. In neither of these grievances did the district court make a finding that the grievant had been the victim of discrimination – the court found only that they had been performing duties outside their job classification, in violation of Article 15. Pet. App. 12a.

In late 1996, three white employees of the Department ("the white grievants") filed grievances alleging that they too had been assigned duties outside their job classification in violation of Article 15. They sought back pay and provisional appointments. The employees' supervisor (all three apparently had the same supervisor) did not provide a satisfactory resolution, and a single hearing for all three grievants was held before the Department's EEO Monitor. The EEO Monitor recommended back pay and provisional appointments for all three, a resolution which was accepted by the white grievants. Pet. App. 12a-13a.

6. *District Court Orders.* On February 26, 1997, counsel for the three plaintiff classes ("plaintiffs' counsel") moved the district court for a temporary restraining order ("TRO") to prevent the Department from implementing the resolutions in favor of the white grievants. They alleged that the Department's implementation of the resolution of the grievances would violate Consent Decree I. The next day, the court conferred with plaintiffs' counsel and the Department's attorneys by telephone; later that day, it issued a TRO which enjoined the Department from implementing the three grievance resolutions. On March 10, plaintiffs' counsel applied for a preliminary injunction and asked the court to extend the TRO until their application could be heard. After another telephone conference with the attorneys, the court extended the TRO and scheduled a hearing for March 24 on the application for a preliminary injunction. Pet. App. 13a-14a.

The hearing was held as scheduled. On April 9, 1997, the court "preliminarily ENJOINED and RESTRAINED" the Department and its agents "from provisionally

appointing, promoting or paying backpay to [the three white grievants]." The Adams Intervenors timely appealed from this preliminary injunction. Pet. App. 14a-15a.

On March 28, before the court had ruled on the application for a preliminary injunction, plaintiffs' counsel applied for a second preliminary injunction; this time, they asked the court to prevent the Department from processing any grievances by non-black employees. Counsel alleged that allowing any non-blacks to utilize the grievance procedure would violate Consent Decree I. The court treated counsel's application as one for a permanent injunction and held hearings in late April 1997. Eleven months later, on March 3, 1998, while the Adams Intervenors' appeal of the April 9 preliminary injunction was pending in the Eleventh Circuit, the district court, in a memorandum order, ruled on counsel's application. See *Reynolds*, 996 F. Supp. 1130. Pet. App. 15a.

In its March 3, 1998, order, the court did not grant plaintiffs' counsel a permanent injunction; instead, acting *sua sponte*, it gave them declaratory relief. It stated that allowing non-black employees to file grievances would be "a tool to allow supervisors again to engage in the secretive and non-competitive selection and promotion of employees." *Id.* at 1132. The court expressed concern that an employee and supervisor would collude to circumvent the competitive system for employment contemplated by the consent decree: the employee, under the direction of his supervisor, would file a fake "grievance," which would result in the supervisor awarding a provisional appointment and back pay. *Id.* at 1139. Despite this concern, the court concluded that issuing an order enjoining

the Department from hearing grievances of non-blacks would be inappropriate under the Eleventh Circuit's decision in *Newman v. Alabama*, 683 F.2d 1312, 1318 (11th Cir. 1982), holding that consent decrees, like all injunctions, are to be enforced through the district court's civil contempt power. Instead of entering a permanent injunction against the Department, the district court entered a declaratory judgment, stating that "the plaintiffs' motions for permanent injunctions . . . are granted to the extent that it is declared as follows: Provisionally appointing, promoting, or paying backpay to [the three white grievants] pursuant to the grievances they filed would violate the consent decree." *Reynolds*, 996 F. Supp. at 1156. Pet. App. 15a-17a.

The Adams Intervenors appealed this declaratory judgment. The Eleventh Circuit consolidated the appeal with their appeal of the preliminary injunction. Pet. App. 18a.

B. Proceedings in the Court of Appeals

The Eleventh Circuit vacated both the preliminary injunction and the declaratory judgment. Pet. App. 18a. It noted that consent decrees, like other injunctions, are to be enforced through the trial court's civil contempt power, citing *Newman*, 683 F.2d at 1317-19. Pet. App. 18a. The court's rationale for vacating the preliminary injunction and declaratory judgment, however, was not based upon the unavailability of such remedies for the enforcement of consent decrees.

The court held that the district court erred in entering the preliminary injunction barring the Department

from implementing the EEO Monitor's resolutions of the white employees' grievances, finding that the Monitor's resolutions did not injure any member of a plaintiff class on account of race or in any other way. Pet. App. 20a.

The court of appeals' determination that the declaratory judgment was in error was based on the merits. The court found that the Revised Complaint Procedure was an amendment to, rather than a violation of, Consent Decree I. Pet. App. 23a. In so holding, the court noted that (a) Consent Decree I provides only race-neutral prospective relief, (b) Article 19 required the Department to draft a complaint procedure and to submit the procedure to "plaintiffs' counsel for review and comment," (c) the Department drafted the "Revised Complaint Procedure" and submitted it to plaintiffs' counsel as Article 19 required, (d) that the draft was entirely neutral with respect to "race, color, creed, sex, national origin, age, or handicap," and (e) the draft was approved by plaintiffs' counsel and by the district court. Pet. App. 22a-23a. The court concluded that the district court had improperly "rewritten" Consent Decree I to make the Revised Complaint Procedure available only to blacks. Pet. App. 17a n.18, 25a.

In addition to concluding that the district court had erred, the court of appeals was critical of plaintiffs' counsel for "inviting" the errors made by the district court. Pet. App. 26a. Because no class member had suffered injury, the court stated that "plaintiffs' counsel were proceeding strictly on their own" and "actually representing no one but themselves" in seeking a preliminary injunction. Pet. App. 21a. The court opined that plaintiffs' counsel's efforts to "prevent[ ] the three white grievants from

obtaining provisional appointments and back pay," proceeding "as if the white grievants had done something unlawful by invoking the race-neutral complaint procedure," was an abuse of judicial process that was "as gross as any we have encountered." Pet. App. 21a. The court was particularly troubled by plaintiffs' counsel's "vigorous" opposition to the white grievants' efforts to intervene for the purpose of protecting their rights to use the race-neutral grievance process. Pet. App. 21a-22a.

The court of appeals characterized the plaintiffs' argument that the Revised Complaint Procedure "violated" Consent Decree I as "preposterous," Pet. App. 23a, holding:

> Consent decrees are contracts, and we construe them using the normal tools for interpreting contracts. . . . Where they are unambiguous, the court must uphold a decree as written. In this case, the contract – the Revised Complaint Procedure – is unambiguous. Moreover, although it was drafted by the Department's attorneys, it was approved by the plaintiff classes' highly sophisticated attorneys.

Pet. App. 23a n.22. Rather than "mutual mistake of fact or some other legally-recognized ground for vitiating contracts," the court found that the plaintiffs sought relief only "[b]ecause they thought they had made a bad bargain, and they wanted to undo it." Pet. App. 23a. Finally, the court found that "[i]n addition to inviting the error, plaintiffs' counsel have attempted to defend the district court's ruling on appeal with baseless arguments." Pet. App. 26a.

The court concluded that it had the authority under 28 U.S.C. § 1927 (1994) to award "excess costs, expenses, and attorneys' fees reasonably incurred" because of counsel's conduct, but that "[c]ounsel subject to section 1927 sanctions are entitled to be heard regarding the matter. . . . " Pet. App. 26a-27a. The court directed the case to be assigned to a different district judge "for the purpose of enabling plaintiffs' counsel to show cause why section 1927 sanctions should not be awarded to the Adams Intervenors." Pet. App. 27a.

Finally, the opinion stated:

> The [district] court is instructed to restore the case to the status quo ante, which means nothing has happened in this case since August 9, 1995, when the district court entered its Order and Injunction, amending Consent Decree I to incorporate the Revised Complaint Procedure.

Pet. App. 28a. There was no indication in the opinion that this instruction to restore the case to "status quo ante" was intended to vacate any orders or other proceedings that were not before the court.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

There are no compelling reasons for granting the writ in this case. Contrary to plaintiffs' argument, there is no circuit split as to any of the issues addressed in the Petition. Plaintiffs argue that the circuits are split as to

the remedies available to the district court for enforcement and interpretation of consent decrees. This argument, however, is based on a mischaracterization of the Eleventh Circuit's decision.

The second issue, that of sanctions against plaintiffs' counsel, is premature, since no sanctions have been awarded, and proceedings are ongoing in the courts below. Neither the sanctions proceedings, nor the Eleventh Circuit's rejection of the district court's findings addressed in the third issue, presents any issue of law requiring resolution by this Court. Rather, both the second and third issues are simply fact-based arguments that the Eleventh Circuit has erred. The final issue presented by the Petition is, like the first, premised on a mischaracterization of the Eleventh Circuit's decision.

Accordingly, the Department submits that the Petition presents no issue worthy of this Court's review.

I. Because the Eleventh Circuit Has Neither Foreclosed Declaratory or Injunctive Relief To Interpret or Enforce Consent Decrees, Nor Held that Consent Decrees May Be Modified Only at the Instance of Defendants, Its Decision Does Not Conflict with Decisions of this Court or Other Circuits

Plaintiffs argue that the Eleventh Circuit's decision in this case is in direct conflict with decisions of other courts of appeals, because it "held that district courts could address problems arising in implementation of consent decrees only through contempt proceedings and, accordingly, that the District Court below did not have the power to enter its preliminary injunction and declaratory

judgment." Pet. 11. The Eleventh Circuit did not so hold. Indeed, it has expressly recognized that, in appropriate cases, declaratory or injunctive relief can be afforded to interpret or enforce a consent decree, and that a consent decree can be modified at the request of either party. Therefore, the opinion is not in conflict with the decisions of this Court or any other court of appeals.

A. Injunctions To Enforce Consent Decrees

Although the Eleventh Circuit has discouraged district courts from entering injunctions to enforce consent decrees, this practice is not prohibited, so long as the burden of proof for entry of such an injunction is met. Typically, this burden cannot be met because contempt proceedings and sanctions are regarded as "adequate remedies at law." *Newman v. Alabama*, 683 F.2d 1312, 1319 (11th Cir. 1982). Thus, the Eleventh Circuit's view is consistent with standard injunction principles applied in every circuit.

In *Newman*, a consent decree had been entered mandating reductions in overcrowding of state prisons and specifically requiring removal of state prisoners from county jails. 683 F.2d at 1315. The State failed to comply with this decree by the deadlines imposed. *Id.* The plaintiffs did not initiate contempt proceedings for this violation, however. Instead, they sought, and the district court entered, a further order directing the immediate release of 352 state prisoners from custody. *Id.* at 1315-16. The Eleventh Circuit determined that, rather than "enforcing" the consent decree, this order was a "distinct mandatory injunction in which the court framed relief that was

beyond the contemplation of the consent decree." *Id.* at 1318.

The Eleventh Circuit in *Newman* noted the variety of sanctions available for failure to comply with a consent decree, including incarceration of responsible state officials or remedial fines. Because of the availability of such sanctions, the court held that no further injunction should have been entered. It reasoned that "the plaintiffs did not carry their burden of showing the inadequacy of their legal remedy." In particular, the plaintiffs "made no showing that the State, if adjudged in contempt for violating the consent decree, would not respond to any of the traditional sanctions available to the court to coerce compliance; the court was therefore not presented with a situation in which its contempt power might be ineffectual." *Id.* at 1319-20. The court further noted, "It could be argued that a conclusion that the court's contempt power is ineffectual cannot be drawn until the court first exercises that power and sanctions fail to produce compliance with the underlying order." *Id.* 1321 n.18. Thus, rather than holding that district courts have no power to issue injunctions to "enforce" consent decrees, the Eleventh Circuit in *Newman* held that injunctive relief may be granted in the event contempt sanctions are shown to be "ineffectual."

In this case, the Eleventh Circuit based its reversal of the preliminary injunction, at least in part, on the absence of any showing that the plaintiffs would be injured by the conduct they sought to prohibit. Pet. App. 20a. Therefore, as in *Newman*, the reversal was based on the plaintiffs' failure to satisfy their burden of proof, not on any rule of law precluding such injunctions in every case.

B. Interpretation of Consent Decrees

Similarly, the Eleventh Circuit has not held that district courts lack the power, through declaratory judgment or otherwise, to interpret ambiguous consent decrees. Indeed, the court in this case expressly held that "[c]onsent decrees are contracts, and we construe them using the normal tools for interpreting contracts." Pet. App. 24a.

The Eleventh Circuit's objections to the declaratory judgment in this case were twofold. First, the court found that, because injunctive relief was inappropriate, the district court could not substitute a declaratory judgment which "it fully expected the Department to treat as an injunction." Pet. App. 16a, 24a. Second, and more importantly, the court found that Consent Decree I, as amended by the Revised Complaint Procedure, was unambiguous and that the declaratory judgment improperly "amended" or "rewrote," rather than "construed," Consent Decree I. Pet. App. 17a n.18, 25a.

In short, the Eleventh Circuit plainly has not foreclosed the use of declaratory judgments to interpret ambiguous consent decrees. Consequently, this case does not conflict with any of the decisions cited by petitioners.

C. Modification of Consent Decrees

Finally, the Eleventh Circuit did not hold, as argued in the brief of the National Bar Association, that a consent decree cannot be amended at the request of plaintiffs. The court in this case noted a "strong public policy against judicial rewriting of consent decrees" and stated that "a

district court may not impose obligations on a party that are not unambiguously mandated by the decree itself." Pet. App. 24a. It also recognized, however, that consent decrees can be modified:

> Consent decrees are construed according to accepted contract principles. *See Reynolds I*, 202 F.3d at 1312-13. We note, however, that "[f]or the purposes of modification, consent decrees are not governed by contract law, but are treated as judicial acts, akin to injunctions." *Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 978 F.2d 1574, 1578 (11th Cir. 1992).

Pet. App. 23a n.22.

In *Jacksonville Branch*, cited with approval in the above note, the request for modification was made *by the plaintiff*. The Eleventh Circuit expressly held that the district court had the "inherent power" to grant the plaintiff's request:

> The district court unquestionably had the inherent power to grant a modification in the CSA. *See United States v. Swift & Co.*, 286 U.S. 106, 114, 52 S. Ct. 460, 462, 76 L. Ed. 999 (1932); *Hodge v. Department of Housing and Urban Development*, 862 F.2d 859, 861-62 (11th Cir. 1989). Modification may be considered when (1) a significant change in facts or law warrants change and the proposed modification is suitably tailored to the change, (2) significant time has passed and the objectives of the original agreement have not been met, (3) continuance is no longer warranted, or (4) a continuation would be inequitable and each side has legitimate interests to be considered. *Rufo v. Inmates of Suffolk County Jail*,

> [502 U.S. 367], 112 S. Ct. 748, 764, 116 L. Ed. 2d 867 (1992); *Newman*, 740 F.2d at 1520.

978 F.2d at 1582. The court in *Jacksonville Branch* upheld the district court's denial of the requested modification, but only because the plaintiff had failed to meet this burden of proof. *Id.* at 1582-83.

The court of appeals' objection in the present case to the district court's modification of Consent Decree I was not that the modification was requested by the plaintiffs, but that it was unjustified and racially discriminatory. It found that "nothing in the record even remotely suggested" that the EEO Monitor's resolution of the claims of the white grievants was discriminatory, but that the district court's "only reason for entering the judgment was to alleviate its concern that, at some unforeseen time in the future, the Department might use the grievance procedure to reinstitute its racially discriminatory practices." Pet. App. 17a n.18. The court of appeals held:

> In sum, if the EEO Monitor's resolution of the three white's [sic] grievances did not discriminate against a member of a plaintiff class, but the court nonetheless felt constrained to nullify the resolutions as violative of Consent Decree I, it follows inexorably that, in the court's view, allowing *any* non-black to invoke the grievance procedure . . . would violate the decree. We therefore treat the declaratory judgment as amending the Revised Complaint Procedure so that it applies only to blacks.

Pet. App. 17a n.18. The court thus concluded that the district court had "no basis in law" for modifying Consent Decree I. Pet. App. 25a. This finding, based on the

unique facts of this case, does not conflict with the law of this Court or any other circuit.

II. The Eleventh Circuit's Order Remanding the Issue of Sanctions Against Plaintiffs' Counsel Is Interlocutory and Should Not Be Reviewed on Writ of Certiorari

The court of appeals' interlocutory order remanding the issue of sanctions against plaintiffs' counsel for further proceedings in the district court is inappropriate for certiorari review. This Court does not ordinarily review interlocutory orders on writ of certiorari. As this Court has held:

> [T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co., 148 U.S. 372, 384 (1893). In *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), the Court similarly held that "except in extraordinary cases, the writ is not issued until final decree." In *Brotherhood of Locomotive Firemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967), the Court denied certiorari, finding that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."

The court of appeals did not impose sanctions against plaintiffs' counsel. Rather, it remanded the issue to the district court "for the purpose of enabling plaintiffs'

counsel to show cause why section 1927 sanctions should not be awarded to the Adams Intervenors." Pet. App. 27a. No order awarding sanctions has since been entered by either the district court or the court of appeals. Particularly in view of the possibility that this issue may become moot by the denial of sanctions, the petition for writ of certiorari should be denied.

Moreover, no other compelling reason exists for granting the writ on this issue. It is too fact-based to have significant precedential value and does not present a conflict with this Court's decisions or the decisions of other courts of appeals.

III. The Third Issue Stated in the Petition Presents No Issue of Law

Plaintiffs' statement of the third issue on which a writ of certiorari is sought – "Whether an appellate court departs from the accepted course of judicial process by making findings of fact based on its own erroneous construction of evidence in the record" Pet. i – presents only issues of fact and not of law. The Eleventh Circuit has not held that it is free to disregard the district court's findings or to make findings "based on its own erroneous construction of evidence." Rather, it held that the district court's findings were not material in light of the unambiguous provisions at issue:

> Because Consent Decree I and the Revised Complaint Procedure are unambiguous, the district court erred when, in determining whether the amendment violated the decree, it considered

> evidence that the plaintiff classes had introduced at the trial of the case, which was aborted before plaintiffs rested, and testimony given at the March 24, 1997, hearing on plaintiffs' counsel's application for a preliminary injunction. . . .

Pet. App. 24a n.23.

Because this "issue" is fact-based and does not present any conflict among the circuits or legal issue of precedential importance, it does not warrant review on writ of certiorari.

IV. The Eleventh Circuit Did Not Vacate District Court Orders that Were Not Before It

The fourth issue relates to the court of appeals' instruction to "restore the case to the *status quo ante*" and its remark that "nothing has happened in this case since August 9, 1995, when the district court entered its Order and Injunction, amending Consent Decree I to incorporate the Revised Complaint Procedure." Pet. App. 28a. It is a truism that courts of appeals have no jurisdiction to vacate orders that are not properly before them. The court did not, however, vacate any orders other than the ones at issue.

Elsewhere in the opinion, the court specifically vacates orders granting the preliminary injunction and declaratory judgment and instructs the district court to strike the plaintiffs' requests for such relief. Pet. App. 18a, 22a, 26a, 28a. Nothing is said about any other orders or proceedings. Under these circumstances, particularly in light of the court of appeals' limited jurisdiction, the instruction to "restore the case to the *status quo ante*"

simply cannot be read to vacate unspecified orders of which the court may not even have been aware.

In *Reynolds I*, decided less than two months before the opinion at issue here, the court of appeals expressed its frustration at the slow progress of this case:

> With the exception of the prospective injunctive relief Consent Decree I has provided, the paths the parties have followed in litigating this case have led to nothing but the expenditure of time and considerable resources.

202 F.3d at 1319. The Department submits that the court's comment in the opinion below that "nothing has happened in this case since August 9, 1995" is merely an echo of this expression of frustration.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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